

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

AHMED SCEGO,

Plaintiff,

v.

MICHAEL MUKASEY, et al.,

Defendants.

Case No. C07-598MJP

ORDER GRANTING
PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES AND
COSTS

This matter comes before the Court on Plaintiff's motion for attorneys' fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). (Dkt. No. 12.) After reviewing the motion, Defendants' response (Dkt. No. 13), Plaintiff's reply (Dkt. No. 14), and all papers submitted in support thereof, the Court GRANTS Plaintiff's motion.

Background

Plaintiff Ahmed Scego is a national of Somalia and has been in the United States since 1989, when he was granted asylum. He applied for naturalization in September 2002 and was interviewed by the United States Citizen and Immigration Services ("USCIS") on February 23, 2004. (See Dkt. No. 5-2, Exs. B & C.) He passed the English language, U.S. history, and government tests. (Id., Ex. C.) As of March 2, 2007, when he filed his complaint, USCIS had not issued a decision on his naturalization application.

Mr. Scego's claims were presented with fourteen other plaintiffs in an amended Complaint for Naturalization, Declaratory Relief and Mandamus filed by Hassan Shamdeen, Case No. C07-164MJP, pursuant to 8 U.S.C. § 1447(b). The Amended Complaint requested the following

1 relief:

2 Plaintiffs request that the Court grant their naturalization applications, give them their
3 oaths of citizenship and order Defendant CIS to prepare and provide certificates of
4 naturalization. In the alternative, Plaintiffs request that the Court remand the cases
to CIS with instructions that the applications be adjudicated within 30 days of the
order.

5 (Dkt. No. 1 at 3.) In a later section of the complaint entitled "Request for Relief," Plaintiffs ask
6 the Court to, among other things:

7 Grant the applications of plaintiffs, and give the plaintiffs their oath of citizenship, or,
8 in the alternative, order Defendant CIS to administer oaths of citizenship to plaintiffs
within 10 days of the order.

9 (Dkt. No. 1 at 15.) On Defendants' motion, the Court severed plaintiffs' claims and created
10 fifteen discrete cases.

11 Mr. Scego was assigned Case No. C07-598MJP. On April 25, 2007, the Court ordered
12 Defendants to show cause why the Court should not grant Mr. Scego's application for
13 naturalization. (Dkt. No. 2.) Defendants responded to the order with a motion to dismiss and/or
14 remand. (Dkt. No. 4.) In that motion, the Government argued that the Court lacked jurisdiction
15 to review Plaintiff's naturalization application and that Mr. Scego's application was not ready to
16 be adjudicated because the FBI had not completed its "name check" of Mr. Scego. In its reply,
17 the Government informed the Court that all background checks had been completed and that
18 USCIS was prepared to adjudicate Mr. Scego's citizenship application. (See Dkt. No. 8, at 2.) On
19 July 24, the Court issued an order in which it concluded that it has jurisdiction over this matter,
20 denied the motion to dismiss, granted the Government's motion to remand, and instructed the
21 Government to adjudicate Mr. Scego's application within thirty days. (Dkt. No. 9.) On August 7,
22 USCIS issued the oath and certificate of citizenship to Mr. Scego. (See Dkt. No. 11.)

23 Plaintiff now brings this motion for attorneys' fees and costs pursuant to the EAJA.

24 Analysis

25 Under the EAJA, a litigant who has brought a civil suit against the United States is entitled
26 to attorney's fees and costs if: (1) he is the prevailing party in the matter; (2) the government fails
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1 to show that its position was substantially justified or that special circumstances make an award
 2 unjust; and (3) the requested fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A).
 3 Additionally, the application for fees must be filed within 30 days of a final judgment. Defendants
 4 do not challenge Plaintiff's motion as untimely.

5 **I. Prevailing Party**

6 Two factors define "prevailing party" under the EAJA. Carbonell v. INS, 429 F.3d 894,
 7 898 (9th Cir. 2005). Plaintiff's action must have resulted in a "material alteration" in the parties'
 8 legal relationship and that alteration must have been "judicially sanctioned." Id. A "material
 9 alteration" means "the defendants were required to do something directly benefitting the plaintiff
 10 that they otherwise would not have had to do." Id. at 900. "A party need not succeed on every
 11 claim in order to prevail. Rather, a plaintiff prevails if he has succeeded on any significant issue in
 12 litigation which achieved some of the benefit [he] sought in bringing suit." Id. at 901 n.5 (internal
 13 citations and quotation marks omitted). Mr. Scego sought the following relief in his complaint:
 14 (1) that the Court grant his naturalization application; or (2) that the Court order USCIS to
 15 adjudicate his application and administer an oath of citizenship. The Court did not award either of
 16 those forms of relief. But alternatively, Mr. Scego requested that the Court "remand the case[] to
 17 [US]CIS with instructions that the applications be adjudicated within 30 days of the Order." (Am.
 18 Compl. at 3.) The Court did remand with instructions to adjudicate within thirty days and Mr.
 19 Scego was quickly naturalized. Mr. Scego thus achieved a material alteration in his legal
 20 relationship with Defendants when his application was finally adjudicated.¹ See Al-Ghanem v.
 21 Gonzales, 2:06-CV-320TS, 2007 U.S. Dist. LEXIS 8900, at *6-7 (D. Utah Feb. 7, 2007).

22
 23 ¹ The Government suggests that Mr. Scego is not a prevailing party because he opposed
 24 the Government's efforts to remand this matter back to USCIS. But the Court's decision to remand
 25 over Plaintiff's objection does not strip him of prevailing party status. See Al-Ghanem v. Gonzales,
 26 2:06-CV-320TS, 2007 U.S. Dist. LEXIS 8900, at *6-7 (D. Utah Feb. 7, 2007) ("The Court looks
 27 to the substance of the litigation to determine whether an applicant has substantially prevailed in its
 position, and not merely the technical disposition of the case or motion.") (quoting Kopunec v.
Nelson, 801 F.2d 1226, 1229 (10th Cir. 1986).

1 The material alteration in the relationship between the parties must also be stamped with
2 some “judicial imprimatur.” Carbonell, 429 F.3d at 901. Relief achieved through a voluntary
3 change that was simply prompted by the lawsuit does not convey prevailing party status on the
4 plaintiff. See Buckhannon Bd. & Care Home v. W. Va. Dep’t of Health & Human Res., 532 U.S.
5 598, 605 (U.S. 2001) (rejecting the “catalyst theory” on the ground that it lacks the critical factor
6 of “judicial sanction”). Here, USCIS did not voluntarily adjudicate Mr. Scego’s application, but
7 was compelled to do so by the Court. When Mr. Scego brought this action under § 1447(b), the
8 Court assumed exclusive jurisdiction and had two options for disposition of the matter: (1) to
9 determine the matter on the merits; or (2) to remand the matter, with appropriate instructions, to
10 USCIS to determine the matter. 8 U.S.C. § 1447(b); United States v. Hovsepian, 359 F.3d 1144,
11 1161 (9th Cir. 2004). On July 24, 2007, the Court remanded Mr. Scego’s case to USCIS with
12 explicit instructions to adjudicate the application and reserved the right to re-establish jurisdiction
13 if Defendants failed to comply with its order. (Dkt. No. 9.) Compare Chebli v. Chertoff, 07-CV-
14 10750, 2008 U.S. Dist. LEXIS 7839 (E.D. Mich. Feb 4, 2008) (denying EAJA fees in § 1447(b)
15 case where parties privately settled matter before Court held naturalization hearing). USCIS acted
16 on Mr. Scego’s application at the direction of the Court and would have violated a court order if
17 it had not done so.

18 Mr. Scego’s success on the merits does not rely solely on the fact that USCIS ultimately
19 granted his application for naturalization; instead, his success stems from the fact that USCIS
20 adjudicated his naturalization application at all. Section 1447(b) is “a statutory check on what
21 could otherwise amount to an infinite amount of time available to the government in which to
22 render a decision on the application.” Alghamdi v. Ridge, No. 3:05cv344-RS, 2006 U.S. Dist.
23 LEXIS 68498, *16 (N.D. Fla. Sep. 25, 2006). The Ninth Circuit has found that “[a] central
24 purpose of [§ 1447(b)] was to reduce the waiting time for naturalization applicants.” Hovsepian,
25 359 F.3d at 1163 (citing H.R. Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542
26 (1989) (statement of Rep. Morrison)). At the time he filed his complaint, Mr. Scego had been
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1 waiting for three years for the Government to issue a decision on his naturalization application.
2 Mr. Scego's action put an end to the delay in processing his application and forced USCIS to
3 make a determination on his immigration status. USCIS's discretion in deciding whether to grant
4 or deny Mr. Scego's application does not transform the adjudication of that application into a
5 voluntary act. See Alghamdi, 2006 U.S. Dist. LEXIS 68498, at *17 ("Whether USCIS ultimately
6 grants or denies the application are [sic] irrelevant for determining whether a plaintiff has
7 succeeded on the merits of an action based on § 1447(b). The sole purpose of § 1447(b) is to
8 provide the applicant with a decision on the application where a decision has been withheld for an
9 unreasonable amount of time."). Mr. Scego is the prevailing party in this action. See id. at *39
10 (finding plaintiff prevailing party where court determined that application had been wrongfully
11 delayed, scheduled hearing, issued remand order while retaining jurisdiction, and where agency
12 then naturalized plaintiff).

13 **II. Substantially Justified**

14 A litigant may not recover fees under the EAJA if the government shows that its litigating
15 position and "the action or failure to act by the agency upon which the civil action is based" were
16 substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d);
17 see also United States v. Real Prop. at 2659 Roundhill Drive, 283 F.3d 1146, 1151 n.7 (9th Cir.
18 2002) ("The EAJA defines the 'position of the United States' as not only its litigation position in
19 the civil action, but also the government's action upon which the civil suit is based."). "Congress
20 enacted the EAJA to ensure that individuals and organizations would not be deterred by the
21 expense of unjustified governmental opposition from vindicating their fundamental rights in civil
22 actions and in administrative proceedings." Abela v. Gustafson, 888 F.2d 1258, 1262 (9th Cir.
23 1989) (emphasis added). "[W]hen analyzing whether the Government was substantially justified in
24 a particular case, courts should consider the Government's litigating position as a whole."
25 Comm'r v. Jean, 496 U.S. 154, 161-62 (1990). The Government bears the burden of showing
26 that its position was substantially justified. Real Prop. at 2659 Roundhill Drive, 283 F.3d at 1151

1 n.7.

2 The government's litigation position rested on two arguments: (1) lack of subject matter
3 jurisdiction, and (2) the appropriateness of remand because USCIS is better equipped to
4 adjudicate a naturalization petition. To find that the government's litigation position was
5 substantially justified, the Court must determine that the arguments had "a reasonable basis in law
6 and fact." Abela, 888 F.2d at 1264. First, a minority of courts have held that district court
7 jurisdiction is triggered, not by the expiration of 120 days after the citizenship interview, but by
8 the expiration of 120 days after the interview and all background checks are complete.
9 See Danilov v. Aguirre, 370 F.Supp.2d 441, 443-44 (E.D. Va. 2005). Although Defendants
10 knew that this Court had asserted subject matter jurisdiction over similar actions, their position
11 against jurisdiction had a reasonable basis in law. Likewise, Defendants' argument that USCIS is
12 better equipped to assess the merits of a naturalization application is reasonable. Thus, the
13 Government's litigating position was reasonable.

14 However, the Government's failure to timely act on Mr. Scego's underlying application
15 was not reasonable. Mr. Scego brought this action because USCIS had failed to adjudicate his
16 naturalization petition even though he had completed his citizenship interview three years earlier.
17 Although no statutory time limit governs the adjudication of naturalization applications, agencies
18 are required to conclude matters presented to them within a "reasonable time." See 5 U.S.C. §
19 555(b). Further, the applicable regulations state that "[a] decision to grant or deny the application
20 shall be made at the time of the initial examination or within 120-days after the date of the initial
21 examination of the applicant for naturalization[.]" 8 C.F.R. 335.3(a). Three years is not a
22 reasonable amount of time to wait for the agency to adjudicate the application. Compare Smirnov
23 v. Chertoff, No. 06-10563-RWZ, 2007 U.S. Dist. LEXIS 9598 (D. Mass. Jan. 18, 2007) (two
24 year delay unreasonable) with Simonovskaya v. Chertoff, 06-11745-RWZ, 2007 U.S. Dist.
25 LEXIS 5446, at *6 (D. Mass. Jan. 26, 2007) (one day delay not unreasonable).

26 Defendants argue that they could not adjudicate the application until Mr. Scego's name

1 check was complete. In a similar case, the Northern District of Florida found that the explanation
2 “that background checks were necessary and had to be completed before the plaintiff could be
3 naturalized... merely restates, in a conclusory manner, the necessity of completing the background
4 check; it does not justify the delay.” Alghamdi, 2006 U.S. Dist. LEXIS 68498 at *43 (emphasis in
5 original). The Alghamdi court reasoned:

6 [W]hile a reasonable person would not dispute the necessity of conducting a
7 background check on an applicant for naturalization, a reasonable person would
8 require a satisfactory justification for a substantial delay in completing the background
9 check. Indeed, government agencies are required to conclude matters presented to
10 them within a “reasonable time.” See 5 U.S.C. § 555(b). Otherwise, an applicant for
11 naturalization remains in perpetual limbo and is by de facto, denied his citizenship, a
right that has been afforded by Congress to deserving individuals since the rise of the
American democracy. This is particularly true when Congress has enacted legislation
permitting the applicant to apply to federal district court if a decision is not rendered
on the application with 120 days of the completion of the examination under 8 U.S.C.
§ 1447(b).

12 Alghamdi, 2006 U.S. Dist. LEXIS 68498 at *42-43 (emphasis in original). Defendants attempt to
13 justify the delay in processing Mr. Scego’s name check by stating that the FBI does not have
14 sufficient resources to complete the millions of name check requests it has received since the
15 events of 9/11 and in the interest of national security, USCIS’s only recourse was to wait for the
16 results of his name check before adjudicating his application. Insufficient resources to do the job
17 that Congress has charged the agency with doing does not substantially justify the delay in this
18 case. See Berishev v. Chertoff, 486 F. Supp. 2d 202, 207 (D. Mass. 2007) (noting that the
19 Government’s burden to show substantial justification “cannot be borne by a general appeal to
20 delays attributable to the FBI background check process” because otherwise, “the 120-day
21 statutory window framed by 8 U.S.C. § 1447(b) would be of no effect”); Shalan v. Chertoff, No.
22 05-10980-RWZ, 2006 U.S. Dist. LEXIS 82795, at *6-7 (D. Mass. Nov. 14, 2006); but see Deng
23 v. Chertoff, No. C 06-7697 SI, 2007 WL 2600732, *1 (N.D. Cal. Sept. 10, 2007) (finding delay
24 justified because of volume of security checks conducted by agency). The Court does not find
25 that USCIS’s delay in processing Mr. Scego’s naturalization application was substantially
26 justified. And the Court does not find that any special circumstances make the awarding of fees

1 unjust.

2 **III. Reasonable Fees and Costs**

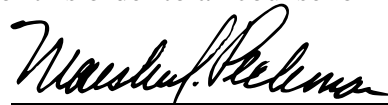
3 Plaintiff is entitled to a “reasonable” amount of fees. 28 U.S.C. § 2412(b). The EAJA
 4 includes a statutory cap for attorneys’ fees, unless a special factor justifies a higher rate. 28
 5 U.S.C. § 2412(d)(2)(A). Because Mr. Scego’s primary attorney needed specialized immigration
 6 law skills to file the original complaint of fifteen plaintiffs, her efforts in originating the action
 7 justify a higher market rate. See Pirus v. Bowen, 869 F.2d 536, 540-42 (9th Cir. 1989).
 8 However, Defendants greatly multiplied the work on these cases by moving to sever the action
 9 into fifteen distinct cases. Because much of the work required in this matter was duplicated for
 10 the multiple plaintiffs, the Court finds it reasonable to award the statutory rate of fees to any
 11 hours spent modifying work product for related cases. Hours billed by other members of
 12 Plaintiff’s legal team are to be compensated at the statutory rate. Further, Plaintiff is entitled to
 13 reasonable costs. Because the Court acknowledges Plaintiff’s primary attorney’s immigration law
 14 expertise, the Court disallows any consultation fee by an outside immigration expert.

15 **Conclusion**

16 The Court GRANTS the motion for attorneys’ fees. Plaintiff is entitled to attorneys’ fees
 17 at the market rate for time spent on any original work in preparing this action, and attorneys’ fees
 18 at the statutory rate for time spent modifying original work for this action once the fifteen
 19 plaintiffs in the original complaint were severed into discrete cases. Plaintiff is also awarded
 20 reasonable costs. The parties are directed to submit a joint proposed order regarding costs and
 21 fees that accords with the Court’s instructions and contains documentation of costs and time
 22 billed. The proposed order shall be submitted to the Court within twenty (20) days of this order.

23 The Clerk is directed to send a copy of this order to all counsel of record.

24 Dated: February 25, 2008.



25 Marsha J. Pechman
 26 United States District Judge
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